No. 95-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

v.

THE CENTER FOR HUMANITIES, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF RESPONDENT

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

W. DEVIER PIERSON
(Counsel of Record)
MARK E. GREENWOLD
CLINTON E. CAMESON
PIERSON SEMMES AND BEMIS
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-4000

Counsel for Amici Curiae

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AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business, trade and professional organizations in the United States. The Chamber represents the interests of more than 215,000 companies, as well as several thousand state and local chambers of commerce and trade and professional organizations. The Chamber regularly represents the interests of its members in critical matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Chamber has a significant interest in the questions presented in this case. Businesses such as those represented by the Chamber are the primary target of damage claims and often suffer unpredictable and arbitrary awards. As a consequence, the Chamber and its members have a strong interest in ensuring that such awards — whether they be compensatory or punitive — are not excessive and that they are imposed in a manner that is fair, rational, and consistent with constitutional principles of federalism and due process. As a frequent *amicus curiae* on punitive damages issues[2] the

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[1] Consent letters of the parties have been previously filed with the Clerk of the Court.

[2] The Chamber has filed briefs *amicus curiae* before the Court in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal*, 492 U.S. 257 (1989); *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO*

(footnote continued on following page)

Chamber is particularly concerned that this Court continue to ensure federal appellate review of excessive punitive damage awards.

The Defense Research Institute ("DRI") is an organization of lawyers specializing in the defense of civil litigation. Its membership throughout the United States numbers in excess of 20,000. DRI seeks to advance the cause of the civil justice system in America by ensuring that the concerns of the defense bar are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of the law, and through testimony before Congress on selected legislation impacting the civil justice system. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system. DRI has filed *amicus* briefs in recent cases before this Court concerning issues of concern to its membership, including standards for excessiveness of punitive damages.

SUMMARY OF ARGUMENT

Petitioner attacks the validity of a Second Circuit ruling that applied a state law standard in a diversity case to determine that a jury award of damages upheld by the trial court

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(footnote continued from preceding page)
Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 1995 (No. 94-896); *Union Security Life Ins. Co. v. Crocker, petition for cert. filed*, 64 U.S.L.W. 3359 (U.S. Nov. 9, 1995) (No. 95-740).

was excessive. Petitioner argues that the Second Circuit's ruling was erroneous in two ways. First, Petitioner maintains that the Seventh Amendment bars appellate review of the trial court's action. Second, Petitioner argues that, assuming appellate review is constitutional, the Second Circuit erred by applying the state standard of excessiveness in its review rather than applying a standard formulated under federal common law. Both of these arguments should be rejected.

The historical background of the Seventh Amendment and the reasons why it does not bar appellate review are set forth persuasively in Respondent's brief and will not be repeated here. Rather, this brief will focus on the proper processes of review conducted by the trial court and the appellate court and explain the respective roles of state and federal law at both levels. It will detail (1) the importance of applying state law standards to determine excessiveness at both the trial and appellate levels, (2) the importance of federal appellate review in vindicating the interests of federalism, and (3) the need for federal courts to focus on actual practice of state courts reviewing awards for excessiveness (*i.e.*, comparative review) in ensuring that the federal courts apply state law in a manner consistent with the practice of state courts.

This brief will support the following conclusions:

1. *Trial court authority.*

As even Petitioner concedes, the trial court in a diversity action[3] may, consistent with the Seventh Amendment, grant a new trial, a partial new trial, or a remittitur of a damage award on the ground that the award is excessive. Judicial re-

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[3] The discussion in this brief applies not only to diversity actions in federal court, but also to other actions in a federal forum governed by state law such as the adjudication of claims founded on supplemental jurisdiction.

view of a jury verdict for excessiveness consists of three processes: (1) determination of the applicable standard of excessiveness; (2) application of the standard to the facts of the case; and (3) if the verdict is found excessive, determining the appropriate remedy. In determining the applicable standard of excessiveness, the trial court should look to state law. It should not merely restate the verbal formulation used by state courts as a standard for reviewing damage awards for excessiveness, but should carefully consider the actual outcomes reached by state courts reviewing damage awards. In applying the appropriate standard of excessiveness, the trial court should attempt to reach the same result as would the highest court of the State. If it finds the award to be excessive, the trial court should apply federal law to determine the appropriate remedy, *i.e.*, new trial, partial new trial, remittitur, *etc.*

2. *Appellate review.*

Federal courts of appeal have authority, consistent with the Seventh Amendment, to review the denial of new trial motions in diversity cases. In doing so, these courts do not directly review the verdict, but rather review the action of the trial court on the motion for new trial based on the alleged excessiveness. The trial court's determination of the proper substantive state standard of excessiveness is subject to *de novo* review inasmuch as it is a question of law. In contrast, the trial court's application of the state standard of excessiveness to the award in the case is reviewed under an abuse of discretion standard. The district court's selection of a remedy is also reviewed under an abuse of discretion standard.

3. *Relationship to Constitutional Due Process Standards in Punitive Damages Cases.*

In punitive damages cases, this Court has recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments establish a separate limit on the size of an

award. This limit is created under and defined by federal law. Even if an award of punitive damages is not excessive under the state law, a punitive damage award that exceeds the federal due process standard must be reversed.

I. TRIAL COURT REVIEW OF A JURY VERDICT FOR EXCESSIVENESS IN A DIVERSITY CASE REQUIRES ASCERTAINMENT AND APPLICATION OF STATE STANDARDS.

A. The Respective Roles of Federal and State Law in the Review of a Jury Verdict for Excessiveness in a Diversity Case Were Confirmed by the Court in *Browning-Ferris*.

Review of jury damage awards for excessiveness[4] on motions for new trial is a traditional function of trial courts at common law and even Petitioner concedes that the Seventh Amendment permits such review.[5] Petitioner correctly states

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[4] Contrary to the arguments of Petitioner and its *amici*, excessiveness review is distinct from review of the sufficiency of the evidence and is not review of a factual finding.

[5] There is no question that the power of a trial court to grant a new trial in a case tried before a jury is perfectly consistent with the Seventh Amendment. The original Judiciary Act of 1789 provided, "[T]hat all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law." 1 Stat. 83, *quoted in* 6A James W. Moore *et al.*, *Moore's Federal Practice* ¶ 59.02, at 59–9 (2d ed. 1995). As shown in the Brief of the Respondent, new trials were granted for excessiveness of jury verdicts at the time the Seventh Amendment was adopted. Similar language has survived in Rule 59 of the Federal Rules of Civil Procedure, which provides, in pertinent part, "A new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . ."

that this Court addressed the appropriate standards of review for both federal trial courts and federal courts of appeals in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).[6]

However, as Respondent's Brief shows, Petitioner severely misstates the holding of that case. *Browning-Ferris* distinguished between whether damages were excessive and whether the proper remedy was applied. *Browning-Ferris* held that the question of whether damages are excessive is determined by state law. *Id.* at 279 ("The role of the district court is to determine whether the jury's verdict is *within the confines set by state law*. . . ." (emphasis added)). After the question of excessiveness has been determined according to state law, it is a question of federal law under Rule 59 of the Federal Rules of Civil Procedure what remedy (*e.g.*, new trial, partial new trial or remittitur) should be ordered. *Id.*; *accord T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1530 n.8 (11th Cir. 1985); *National Food Stores Inc. v. Utley*, 303 F.2d 284, 286-87 (8th Cir. 1962). The only case the Court cited in the relevant discussion in *Browning-Ferris, Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), does not deal at all with the substantive question of whether an award is excessive, but rather with the procedural question of whether a party who has accepted a remittitur may also appeal it. *Donovan* applied federal law because the questions at issue were procedural and remedial in character.

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[6] *Browning-Ferris* concerned punitive damages, but its analysis is applicable to compensatory damages as well. That case was decided before this Court's decisions in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), all of which recognized a separate federal standard of excessiveness for punitive damages under the Due Process Clauses. See Part III *infra* for consideration of the interaction of this separate standard of excessiveness with the *Browning-Ferris* analysis.

B. The Applicability of State Law to Test Excessiveness is Required by the Principles of Federalism Recognized in *Erie* and Its Progeny.

As *Browning-Ferris* implicitly recognized, the question of whether a damage award in a diversity case is excessive must be decided by state law under the principles of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Determination of the measure of damages for an action created under state law is part of substantive state law and is determined under *Erie* by state, not federal law. *See, e.g., Peters v. T.G. & Y. Stores Co.*, 707 F.2d 227 (5th Cir. 1983); 1A James W. Moore *et al., Moore's Federal Practice* ¶ 0.309[1], at 3105 n.27 (2d ed. 1995). Thus, numerous courts have held that in a diversity case the issue of whether the jury's verdict is excessive is determined by reference to state law, even though federal law determines whether a new trial should be granted.

This is not a case in which any federal rule or federal statute is inconsistent with the application of state law and where a choice must be made between following a federal rule and following state law. Other than the Rules of Decision Act, 28 U.S.C. § 1652 — which provides that state law governs absent a federal constitutional, treaty, or statutory provision to the contrary — no federal rule or statute tells a court how to measure excessiveness of damages in a diversity case.[7] The choice is between following state

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[7] It cannot seriously be contended that Rule 59 of the Federal Rules of Civil Procedure — or any federal rule — is the source of a requirement that excessiveness of a damage award in a diversity case be considered under a federal standard. Nothing in the language of the rule remotely suggests such a conclusion. However, to the extent that Rule 59 is invoked as the source of such a federal standard, this position cannot be supported. Federal rules established under the Rules Enabling Act may

(footnote continued on following page)

law or rejecting it and establishing excessiveness according to a court-developed federal common law. Establishment of a federal common law in this area is precisely what this Court said it would *not* do in *Browning-Ferris*. 492 U.S. at 279.

Since no inconsistent federal rule or statute is involved, the analysis of cases such as *Hanna v. Plumer*, 380 U.S. 460 (1965), is not applicable. Rather, this Court's analysis in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), provides the applicable standard. In *Walker*, the Court held that application of the *Hanna* analysis is premised on a "direct collision" between a federal rule and state law and held that "[s]ince there is no direct conflict between the Federal Rule and the state law, the Hanna analysis does not apply." *Id.* at 752. Where there is no direct conflict between a state and federal rule, state law must govern, either as a constitutional matter under *Erie* or on a statutory basis under the Rules of Decision Act. In confirming this rule in *Walker*, the Court

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(footnote continued from preceding page)
not "abridge, enlarge, or modify any substantive right" created by state law. 28 U.S.C. § 2072. Many cases since *Erie* have held that in a diversity action a federal court must apply state law on questions that involve "substantive law" rather than "procedure." *See generally* 19 Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4509 (1982 & Supp. 1995). Under this standard, the determination of whether a damage award is "excessive" clearly involves the policy judgment by the State as to the appropriate measure of damages for out-of-court conduct rather than the procedure by which a matter is tried. The establishment of a measure of damages is substantive and not procedural, and the determination of what constitutes an excessive award is substantive because it involves state policies governing the behavior of parties outside the courtroom. *See, e.g., Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1011 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 21, 1996) (No. 95-1339); *Peters v. T.G. & Y. Stores Co.*, 707 F.2d 227, 229 (5th Cir. 1983); *Blasky v. Wheatley Trucking Co.*, 482 F.2d 497, 498-99 (6th Cir. 1973); 1A Moore, *supra*, ¶ 0.309[1], at 3105 n.27.

restated the two principal bases of the *Erie* doctrine: (1) the avoidance of forum-shopping and (2) avoidance of inequitable administration of the law. *Id.*

The problem of forum-shopping was at the heart of this Court's decision in *Erie*, and the desirability of limiting the potential for forum-shopping remains a significant consideration in choice of law questions. Contrary to Petitioner's conclusory statement that the substance of judicial review for excessiveness would not affect a plaintiff's choice of forum, a substantial difference in federal and state standards of judicial review on this issue would have a considerable effect on such choices.

This Court has previously recognized the crucial role played by judicial review in controlling excessive damage awards. In *Haslip*, it recognized that unlimited jury or judicial discretion in the fixing of punitive damages "may invite extreme results that jar one's constitutional sensibilities." 499 U.S. at 18. The Court held that appellate review, which included comparative review with other cases, provided a necessary and meaningful constraint on jury discretion. *Id.* at 22. In *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the Court held that judicial review of punitive damages awards for excessiveness was so significant a procedural protection that it was required by the Due Process Clause of the Fourteenth Amendment. Furthermore, even commentators who assert that the damages crisis facing the American justice system has been exaggerated — a view *not* held by *Amici* — have noted the profound effect of judicial excessiveness review on the outcome of cases. *See* Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 51 (1992). In light of this history, it would be unrealistic not to recognize that many litigants will select a forum based on the type of excessiveness review that will control in their cases. The potential applicability of different standards of

excessiveness in the same state — one state and one federal — would surely be a significant factor in determining the desirability of a federal forum. This motivation was explicitly recognized by the Ninth Circuit in *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (9th Cir. 1951), where the court described the plaintiff as "apparently seeking the decision of a judge who would sustain a larger award than the state judge" on review for excessiveness and characterized the federal action as "a clear case of what is aptly called 'forum shopping.' " *Id.* at 563.

Even if there were no prospect of forum-shopping, the likelihood of "inequitable administration" of the law would require application of state law. *Walker,* 446 U.S. at 753. The maintenance of separate standards of excessiveness, one state and one federal, within the same State would also lead to inequitable administration of the law. Such a conflict in standards would create disparate results for similarly situated parties in the same jurisdiction. As this Court held in *Guaranty Trust Co. of New York v. York,* 326 U.S. 99 (1945), "[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law." *Id.* at 112.

Petitioner's reliance on *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 356 U.S. 525 (1958) (P. Br. at 14), to support his argument that excessiveness should be determined with reference to a federal standard is misplaced. *Byrd* involved a claim under the South Carolina workmen's compensation act. Under that State's law, certain defenses under the act were to be decided by the court and not submitted to the jury. This Court held that the state policy of having the trial court decide the issue was not "bound up with the definition of the rights and obligations of the parties" created by South Carolina law. *Id.* at 536. It had instead evolved as an outgrowth of judicial review of administrative action under that State's statutory compensation scheme without explicit consideration of the responsibilities of judge and jury. *Id.* Under

the facts of *Byrd*, the Court held that federal policies concerning trial by jury should govern.

Byrd involved allocations of function between jury and judge. By contrast, this case does not involve the allocation of functions between jury and judge since both federal and state laws provide for review of jury verdicts for excessiveness. The question is not whether the court may review the award for excessiveness, but rather, when reviewing it, what substantive standard to apply. Moreover, unlike the state procedural rule in *Byrd*, the state standard of excessiveness is "bound up with the definition of rights and obligations of the parties created by state law."

C. In Applying the State Standard of Excessiveness, the Federal Courts Should Compare the Verdict to Actual Results of State Cases and Not Simply Apply the Verbal Formulation Applied by the State Courts.

Where a federal court in a diversity case applies state excessiveness law under *Erie*, its goal should be to ensure that the damages award does not exceed that which would be sustained by the State's highest court. In order to accomplish this goal, the federal court ought to consider *all* the sources of law that provide guidance about what the result would be in state court. *See, e.g., Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 750 (2d Cir. 1984). This matter is discussed *infra* at pp 18-21 in the context of appellate review. The same arguments apply to trial court review.

II. APPELLATE REVIEW OF THE TRIAL COURT'S EXCESSIVENESS DECISION ACCORDS WITH THIS COURT'S HOLDINGS AND IS NECESSARY TO PROTECT THE INTERESTS OF FEDERALISM.

A. Appellate Review of a District Court's Denial of a Motion for a New Trial under Rule 59 on Excessiveness Grounds Is an Important Procedural Protection.

Respondent's brief shows that the Seventh Amendment does not bar appellate review of the district court's denial of a motion for new trial under Rule 59 on the ground that a damage award was excessive. In the absence of a constitutional bar, there is no legal basis for excluding such review. Moreover, this appellate consideration provides an essential protection against arbitrary results in an area of the law in which judicial review has historically provided a bulwark against such outcomes. *Honda Motor Co. v. Oberg*, 114 S. Ct. 114 S. Ct. 2331, 2341-42 (1994).

The United States courts of appeal have jurisdiction of appeals from "all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. Moreover, federal appellate courts have plenary authority to review the orders of federal district courts. *See* 28 U.S.C. § 2106. Petitioner does not suggest that the denial of a motion for a new trial is not a final decision, nor does he suggest any legal basis — other than the Seventh Amendment — to preclude such review. Thus, unless the Seventh Amendment bars their review, the courts of appeal have jurisdiction to review excessiveness decisions of the district courts.

Although Petitioner argues that there is no need for appellate review of final district court action, his position is altogether at odds with the established mode of litigation in federal courts. It should not be incumbent on Respondent to show why appellate review is required. Rather, Petitioner bears the heaviest of burdens to show why in this particular class of cases the ordinary rules of appellate jurisdiction do not apply. In fact, however, there are overwhelming arguments why appellate review for excessiveness is an important and mandatory procedural protection.

Appellate review in diversity cases promotes important aims of the federal system. As this Court recently declared:

> [A]ppellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in Erie. The twin aims of the Erie doctrine — 'discouragement of forum-shopping and avoidance of inequitable administration of the laws' — are components of the goal of doctrinal coherence advanced by independent appellate review. . . . [D]eferential appellate review invites divergent development of state law among the federal trial courts even within a single State. Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum.

Salve Regina College v. Russell, 499 U.S. 225, 234 (1991) (quoting *Hanna*, 380 U.S. at 468) (citations omitted).

These values are particularly important in protecting litigants from arbitrary or excessive damage awards — an area in which this Court has recognized the central importance of judicial review. *See Honda*, 114 S. Ct. at 2339-41. Moreover, precisely because excessiveness is a difficult concept to define and measure with precision, the need for some centralized decision-making authority within the federal judi-

ciary is particularly evident. If each district court within a State were free, without the constraint of appellate review, to determine excessiveness for itself, the prospect for confusion and inconsistency between federal courts in the same State would increase.

Furthermore, the abolition of appellate review would make it more difficult to avoid conflicts between state and federal authority. If, as occurred in this case, a federal court upheld a judgment that was inconsistent with state law, the court of appeals would have no way to rectify the conflict. This problem is especially troublesome since the federal judgment would then become a benchmark for the reasonableness of future awards, and a state system designed to control the level of awards would be undermined.

In addition to these considerations of federalism, there are also reasons rooted in the institutional structure of courts of appeal that argue for retaining the normal process of appellate jurisdiction in this area. *See First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1926 (1995) (citing institutional advantages of appellate courts as a basis for determining their appropriate attitude in reviewing decisions of the district courts). Determinations of excessiveness involve conclusions based upon inherently imprecise standards. This fact alone counsels for some centralization of review in order to preserve a modicum of consistency in the face of otherwise rather vague principles. Without the sober reflection of appellate review, comparability of results in similar circumstances would be far more difficult to ensure.

Additionally, review by the courts of appeal adds a different and significant value that trial court review lacks. Unlike trial courts that must address a multitude of issues under severe time constraints, appellate courts function collegially in multi-judge panels that permit "reflective dialogue and collective judgment." *Salve Regina*, 499 U.S. at 232. For a difficult and challenging task such as the application of

consistent rules about excessiveness, there is no warrant for a dramatic departure from normal appellate procedure to eliminate these reflective collegial values.

For these reasons, every State and federal jurisdiction now permits appellate review of trial court determinations of excessiveness. It is no accident that all thirteen courts of appeal in the federal system have found appellate review of excessiveness determinations by district courts to be required. *See Grunenthal v. Long Island R.R.*, 393 U.S. 156, 157 n.3 (1968); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1580-81 (Fed. Cir. 1992); *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1529-31 (11th Cir. 1985). Moreover, such review is required in all 50 state court systems as well — a fact reflective of the general recognition that appellate consideration of these matters serves important values. *See Honda*, 114 S. Ct. 2338 (noting that judges review damages awards in every State but Oregon and ordering Oregon's courts to review such matters for due process violations); *Dagnello v. Long Island R.R.*, 289 F.2d 798, 799-80 n.1 (2d Cir. 1961); *City of Nome v. Ailak*, 570 P.2d 162, 173-74 (Alaska 1977); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992).

It is clear that appellate review of trial court judgments for excessiveness serves an important purpose because appellate tribunals can and do alter the results of cases. Although the courts of appeal appropriately accord substantial discretion to trial courts' determinations of excessiveness, on occasion, and in important ways, they do intervene to

change results that would be contrary to law.[8] Moreover, without appellate review of excessiveness determinations by district courts, there would be no means to review decisions that are strikingly significant to the fair administration of justice. For example, under the rule advocated by Petitioner, the district court's affirmance of the punitive damage award of $5 billion against Exxon in the Exxon *Valdez* case would not be reviewable. *See In re Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 527988 (D. Alaska Jan. 27, 1995). Although that award may ultimately be upheld on appeal, it would be strange indeed to carve out a unique exception to customary standards of review to insulate such extraordinary awards from appellate scrutiny.

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[8] *Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (reducing punitive damage award from $2 million to $1 million), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993); *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (reducing punitive damage award from $25 million to $12.5 million), *cert. denied*, 504 U.S. 910 (1992); *Post Office v. Portec, Inc.*, 913 F.2d 802 (10th Cir. 1990) (reducing punitive damages award from $1.5 million to $500,000), *cert. granted, judgment vacated, case remanded*, 499 U.S. 915, *appeal vacated as moot*, 935 F.2d 1105 (10th Cir. 1991); *Simon v. Shearson Lehman Bros.*, 895 F.2d 1304 (11th Cir. 1990) (reducing punitive damages award from $8 million to $1 million); *Kelley v. Sears, Roebuck and Co.*, 882 F.2d 453 (10th Cir. 1989) (new trial because punitive damages award of $1.25 million found to be based on passion and prejudice); *DeRance, Inc. v. PaineWebber, Inc.* 872 F.2d 1312 (7th Cir. 1989) ($20 million punitive damages award found excessive); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (ordering new trial because $2.5 million punitive damages award found excessive); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10 (2d Cir. 1988) (reducing punitive damages award from $1 million to $250,000), *cert. denied*, 490 U.S. 1006 (1989); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597 (5th Cir.) (ordering new trial because of excessiveness of $5 million punitive damages award), *cert. dismissed*, 486 U.S. 1027, *cert. denied*, 488 U.S. 848 (1988); *see also Zazú Designs v. L'Oréal ,S.A.*, 979 F.2d 499 (7th Cir. 1992).

Finally, recognition of the need for appellate review is necessary to assure vindication of substantive due process rights recently recognized by this Court. In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the Court explicitly recognized that the Due Process Clause imposed a substantive limit on the size of punitive damage awards. Although the protection from grossly excessive awards under the Due Process Clause functions differently from the state-created excessiveness limits (*see* Part III *infra*), a blanket holding that the Seventh Amendment bars appellate review of such awards would prevent federal appellate courts from vindicating that right.

B. The Court of Appeals Should Review the District Court's Determination of the State Law of Excessiveness *De Novo*.

The determination of the state standard of excessiveness by the district court is a question of law that is subject to *de novo* review in the appellate court. In *Salve Regina College v. Russell,* this Court rejected an argument that the courts of appeal should apply "deferential review" to a district court's determination of state law and held that "a court of appeals should review *de novo* a district court's determination of state law." 499 U.S. at 231. The Court recognized the institutional values served by *de novo* appellate review of the determination of state law and found that "independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Id.*

As the Court has recognized, the expertise of district courts in matters involving state law should inform the structure and content of its conclusions of law and thus become evident to the reviewing court. *Id.* at 232. However,

"independent review . . . does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions." *Id.* at 232-33.

As shown above, the determination of the state law standard of excessiveness must include not merely a recitation of the verbal formulation state courts apply in evaluating an award (*e.g.*, "shocks the conscience," "grossly excessive," "monstrous," *etc.*), but also an analysis of the results state courts actually reach in reviewing an award for excessiveness. In establishing standards for the measurement of damage awards, most States employ one or more of several verbal formulations, none of which fully describes the content of such review. As this Court recently observed, "[a]lthough courts . . . use different verbal formulations, there may not be much practical difference between review which focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' " *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 n.5 (1994).

Under these circumstances, it is extremely important for a federal court to look beyond the verbal formulations employed by the state courts to determine how they are actually resolving cases involving excessiveness. Probing beyond the mere recitation of the verbal standard is vital since a relatively consistent and meaningful state practice may exist which provides more significant guidance than do the often uninformative verbal guidelines. The level of the inquiry must be guided by the purposes of *Erie*. Since the goal of a federal court sitting in diversity is to apply the same law as that applied by a state court to the facts of a case, a searching inquiry of all sources of law is required — including an analysis of the results state courts actually reach in reviewing damage awards. Failure to apply the state substantive

standard of excessiveness in the manner the State itself actually applies it would lead to inequitable administration of justice, as similarly situated litigants in the same State would not receive comparable treatment. *See Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1009 (2d Cir. 1995) ("It should be our goal that persons who endure a similar degree of suffering can expect to receive a roughly similar award of compensation . . . . ; [g]reat discrepancies in awards destroy the fairness of the judicial system, as well as the predictability of litigation."), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 21, 1996) (No. 95-1339); *cf. Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) (vacating a damages award as excessive in light of awards for similar injuries in other cases).

The Second Circuit, like several other circuits, has emphasized the importance of comparative analysis in its review of the district court's finding of state law and has looked beyond the verbal formulations employed. In *Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740 (2d Cir. 1984), the court applied a "shocks the conscience" test but held that, (1) "we . . . have the responsibility to ensure 'that the damage award does not exceed that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim,' " *id.* at 750 (quoting *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 472 (8th Cir. 1977)), and (2) "we look, as a court sitting in diversity, to other jury awards condoned by the courts of the state whose substantive law governs the rights of the parties . . . ." *Id.* This resort to examination of the actual practice embodied by the state cases is far more significant to the result than application of the "shocks the conscience" test.

Perhaps the clearest articulation of the proper approach to be used by a federal court, where the verbal formulation of the state standard differs from the traditional "shock the conscience" test, was made by Judge Sifton in *In re Joint E. & S.*

Dist. Asbestos Litig., 798 F. Supp. 925 (E.&S.D.N.Y. 1992), *rev'd on other grounds*, 995 F.2d 343 (2d Cir. 1993), and *rev'd on other grounds sub nom. Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993). After noting that the verbal formulation adopted by New York differed from the federal standard, the court stated:

> For the purpose of a federal court's remittitur decision, however, the two standards work in harmony. It "shocks the conscience" of a federal judge for a federal court sitting in diversity to allow a verdict which would necessarily be remitted as a matter of law by a state court using the appropriate state standard.

Id. at 937.

Similarly, in *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1012-15 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 21, 1996) (No. 95-1339), the Second Circuit criticized the district court for looking to a federal decision as a guide for excessiveness and ignoring state cases. Other circuits have also adopted the practice of looking carefully at actual state decisions in determining the standard of excessiveness under state law. *See, e.g., Marcel v. Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994) ("We review a claim of excessiveness by comparing the awards at issue with rulings in other factually similar cases decided under controlling law, here Louisiana law."); *cf. Johnson v. United States*, 780 F.2d 902, 908 (11th Cir. 1986) (comparing FTCA awards to awards rendered under state law); *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 86 (1987) (same). The fundamental principles requiring this type of review are encapsulated by the venerable directives of this Court that a "federal court enforcing a state-created right in a diversity case is . . . in substance 'only another court of the State,' " *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (quoting

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108 (1945)), and that "[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law." *York*, 326 U.S. at 112.

C. Application By the District Court of the State Standard of Excessiveness to the Facts of the Case Should Be Reviewed on an Abuse of Discretion Basis.

In contrast to the determination of the state standard of review — which is a pure question of law — application of the standard to the facts of a particular case is a mixed question of law and fact for which a more deferential standard of review is appropriate. As this Court has recognized, district judges who have presided over the trial of cases should be accorded a higher degree of deference in matters involving mixed questions of law and fact or the detailed supervision of litigation. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Miller v. Fenton*, 474 U.S. 104 (1985). Thus, the application of the legal standard of excessiveness to the facts of the particular case should be reviewed under an abuse of discretion standard.

Although the abuse of discretion standard itself is derived from federal law, the application of the standard should be guided by overriding *Erie* principles. The trial court should exercise its discretion to determine whether a particular award is excessive with the goal of assuring that the damage award does not exceed that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim. *Martell*, 748 F.2d at 750; *Hysell*, 559 F.2d at 472. Such a determination should be based on its analysis of all sources of state law — and most

especially on the actual practice of the state courts.[9] There may be reasons why awards in past cases do not offer an accurate or complete guide to determining how the State's highest court would resolve a case. For example, if the only comparable cases were decided in the distant past, the damage awards upheld might have little predictive value about what conclusion the State's court of last resort would reach now. Differences in fact patterns might also account for differences in verdicts. However, the fact that comparative review is not the sole determinant of the award does not mean that courts may simply ignore such important data. Where a trial court ignores a pattern of state practice without articulating its reasons, it has thereby necessarily abused its discretion.

D. The District Court's Choice of a Remedy Is Governed by Federal Law and Is Reviewable Under an Abuse of Discretion Standard.

Browning-Ferris confirmed that, while state law governed with respect to review of a damages award for excessiveness, federal law governs the choice of a remedy (*i.e.*, new trial, partial new trial, and remittitur). Federal courts of appeal have recognized this distinction. *See, e.g., Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1446 (11th Cir. 1991). Thus, a federal court may order remittitur even though state law does not recognize the remedy of remittitur. *Jenkins v. McLean Hotels, Inc.*, 859 F.2d 598, 600 n.2 (8th Cir. 1988); *Hale v. Firestone Tire & Rubber Co.*,

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[9] *Cf.* Arthur L. Corbin, *The Laws of the Several States*, 50 Yale L.J. 762, 774 (1941) ("The court of the forum should use the very same juristic data in determining the rights of litigants, whether the forum be a federal court or a state court. . . . If the federal judge is required to disregard some of those available data, the litigant is not getting the same justice that he would get if the forum were a court of the state.")

820 F.2d 928, 936 n.1 (8th Cir. 1987). The trial court's choice of remedy is then reviewable under an abuse of discretion standard. *Browning-Ferris*, 492 U.S. at 277.

III. THE DUE PROCESS CLAUSE PROVIDES AN INDEPENDENT LIMIT ON PUNITIVE DAMAGE AWARDS.

The preceding discussion concerns judicial review of damage awards in diversity cases under state law standards. In *Haslip*, the Court stated that "unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18. In *TXO*, a majority of the Court agreed that "the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award." 113 S. Ct. at 2718. In *Honda*, this Court declared that "our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damage awards. . . . A plurality in TXO assented to the proposition that 'grossly excessive' punitive damages would violate due process." *Honda*, 114 S. Ct. at 2335. Although this Court has not provided guidance as to the content of this standard, at least one court of appeals, in an opinion by retired Justice White, has found an award excessive under the *TXO* standard. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 658-61 (8th Cir. 1995).

The standard established in these cases recognizes that the federal Constitution provides protection against an award that is arbitrary and excessive, *even if such an award would be permitted under state law*. Thus, there is a federal standard, based on federal law, that may apply to limit a punitive award that would not otherwise be found excessive under state law. Conversely, a punitive award that might not be ex-

cessive under the federal due process standard might still be excessive under a state law that is more restrictive.[10] Thus, in a punitive damages case *both* the state standard of excessiveness and the federal due process standard potentially limit an award of damages, and the fact that an award might pass muster under state standards does not necessarily mean that it would be upheld under the federal constitutional due process standard.

As noted above, this Court must consider the effects of Petitioner's arguments on the rights of litigants to a proper adjudication — including appellate judicial review — of their federal due process claims. The Court has "stressed the availability of *both* meaningful and adequate review by the trial court and subsequent appellate review." *Honda,* 114 S. Ct. at 2335 (emphasis added). Moreover, this Court went on to recognize the importance of judicial review of the size of punitive damage awards as a "safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.*

Petitioner's argument is at odds with these constitutional protections. The elimination of appellate judicial review of punitive damage awards for excessiveness would leave litigants without a procedure to vindicate their constitutional rights. This Court should avoid an interpretation of the Seventh Amendment that would effectively nullify rights guaranteed by other provisions of the Constitution.

Whatever the outcome of this case, this Court must recognize: (1) that the federal constitutional protection against

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[10] In *TXO*, a majority of the Court agreed that "a violation of a state law 'reasonableness' requirement would not . . . necessarily establish that the awards is so 'grossly excessive' as to violate the Federal Constitution." 113 S. Ct. at 2720.

excessive punitive damages is a separate and independent limitation from state excessiveness standards; and (2) that adequate procedures to ensure judicial appellate review to vindicate this federal right must be preserved.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed, and the Court should hold: (1) that the Seventh Amendment does not bar appellate review of jury verdicts for excessiveness; (2) for purposes of determining whether a damage award is excessive, a federal court in a diversity case is to determine excessiveness by determining that the award does not exceed the award which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim; and (3) the federal constitutional limitation of punitive damages under the due process clause imposes a limit on punitive damages separate from the state limit, and procedures for full judicial appellate review under this standard must be protected no matter what outcome is reached.

Respectfully submitted,

Of Counsel:
Stephen A. Bokat
Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

W. DeVier Pierson
(*Counsel of Record*)
Mark E. Greenwold
Clinton E. Cameron
PIERSON SEMMES AND BEMIS
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-4000

Counsel for *Amici Curiae*

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